

# Justice for the Rohingya: three roads to accountability

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The past week (11-15 November 2019) has seen Myanmar facing an arsenal of legal challenges for alleged international crimes before the International Criminal Court (ICC), International Court of Justice (ICJ) and the federal court in Argentina. After decades of documented (gross) human rights violations against the Rohingya, efforts to secure accountability has gained momentum following multiple allegations of crimes against humanity and genocide by various United Nations (UN) investigative efforts, including the Fact-Finding Mission on Myanmar (FFM) and the Special Rapporteur on the Situation of Human Rights in Myanmar. This post serves to provide an overview of the aforementioned judicial processes and on the Independent Investigative Mechanism for Myanmar (IIMM). Their mandates as well as similarities and differences in the temporal, geographical and material scope of such processes will also be discussed.

## A brief background on the Rohingya

The Rohingya are not considered citizens of Myanmar and have no legal rights pursuant to the 1982 Citizenship Law. Based on this legal regime, citizenship and rights are dependent upon belonging to one of Myanmar's 135 predetermined "national races". The Rohingya are not regarded as such. While evidence of grave human rights violations against them have been documented by the UN since 1992, the situation escalated when Myanmar security forces began widespread and systematic "clearance operations" against them in October 2016. A second wave of violence in August 2017 occurred on an even larger and wider geographical scale, which displaced more than 700,000 Rohingya to Bangladesh. Investigations conducted by UN bodies have documented the commission of, *inter alia*, mass murders, sexual and gender-based violence, torture, and the burning of houses and other property during these operations.

## The Gambia v. Myanmar at the ICJ

On 11 November 2019, The Gambia instituted proceedings before the ICJ against Myanmar alleging "manifest violation" of the latter's obligations under the 1948 Genocide Convention. Both are States Parties to the Convention. Attributing various genocidal acts to the Myanmar security forces, the Gambia invoked Myanmar's responsibility for, *inter alia*, committing [article III(a)], attempting to commit [article III(d)], conspiring to commit [article III(b)], inciting [article III(c)], complicity in [article III(e)], and failure to punish and prevent genocide [articles I, IV, and VI]. The application limits its temporal scope to events occurring since October 2016 to date.

The Gambia's [application](#) was filed on the basis of Article IX of the Convention, which allows for the submission a dispute to the ICJ concerning the interpretation,

application, and fulfillment of the Convention. Neither State has entered a reservation to the clause. Noting the *jus cogens* status of the prohibition of genocide, The Gambia asserts that their repeated efforts to apprise Myanmar of their violations of obligations *erga omnes* and *erga omnes partes* under the Convention have been rejected and opposed to. A request for provisional measures to halt all actions that may aggravate the current situation of the Rohingya was also made.

Public hearings on the request for provisional measures will be held on 10-12 December 2019. Should this reach the Merits stage of proceedings, it would be only the second time that the ICJ hears on a dispute on the Genocide Convention, the first being the landmark *Bosnia and Herzegovina v Serbia and Montenegro* case.

### **Universal jurisdiction case in Argentina**

A few days later on 13 November 2019, the Burmese Rohingya Organization UK (BROUK) filed a [lawsuit](#) before a federal court in Argentina for crimes against humanity and genocide, implicating several individuals in the highest echelons of the civilian government and military. This includes State Counsellor Aung San Suu Kyi and the Tatmadaw Commander-in-Chief General Min Aung Hlaing. The complaint states that, while Myanmar security forces primarily perpetrated and have command responsibility for the alleged crimes, “it is impossible to rule out the participation of the civilian authorities through any type of assistance, whether in the planning, the preparation, the execution and/or the concealment of the operations and the Governmental measures aimed at the ethnic cleansing of the Rohingya community”.

The complaint, filed on the basis of universal jurisdiction, includes alleged crimes committed, as a minimum, in the period spanning from the year 2012-2018. To eliminate the possibility of contravening the principle of *ne bis in idem*, it concerns crimes committed in Myanmar, “as long as it does not exist so far in the legal area of Myanmar, internationally or of a third State, any concrete procedure dealing with those crimes committed against the Rohingya in the territory of Myanmar”. It remains to be seen how the court will rule on the complaint and whether proceedings will ensue.

### **Investigations approved at the ICC**

On 14 November 2019, Pre-Trial Chamber III of the ICC [authorized](#) an investigation into alleged crimes against humanity, including persecution and deportation, of the Rohingya in Myanmar following the Prosecutor’s *proprio motu* request. Given that Myanmar is not a State Party to the Rome Statute, the Court can only exercise jurisdiction for “where a part of the *actus reus* of a crime within the jurisdiction of the Court is committed on the territory of a State Party”. This would not only include Bangladesh, but also other States Parties or States that have accepted the Court’s jurisdiction, as long as the alleged crimes in question are “sufficiently linked to the situation as described in this decision”.

While the Prosecutor only requested to investigate alleged crimes committed since 9 October 2016, the Chamber has authorized the expansion of the temporal scope of the investigation to on or after 1 June 2010 – the entry into force of the Statute for

Bangladesh – and to the date after the entry into force of the Statute for other States Parties. As for alleged crimes of a continuous nature, the investigation can also be extended to alleged crimes committed before the entry into force of the Statute for States Parties, provided that the aforementioned crimes continued after that date.

### **Evidence collection by the IIMM**

An investigative mechanism existing parallel to the aforementioned legal challenges is the IIMM. It is mandated to “collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law” and to “prepare files in order to facilitate and expedite fair and independent criminal proceedings”. In addition to utilizing evidence handed over by the FFM – now defunct – they are also mandated to document alleged crimes and violations that occurred since 2011 to an unspecified temporal limit in the future. Among all current judicial proceedings and investigations, the IIMM’s mandate covers the widest scope geographically, temporally, and materially. It is not yet certain to what extent the IIMM’s involvement will be in current and future national, regional and international criminal prosecutions of alleged crimes in Myanmar.

### **What’s next?**

As discussed above, the temporal, material, and geographical scope of the alleged crimes put forward in the existing legal challenges vary to a large extent. Whereas these legal developments warrant celebrations and although crucial to recognize the atrocious nature of the alleged crimes, it must be noted that they only concern alleged crimes against the Rohingya. However, the international community must not overlook other alleged crimes and gross violations of international law committed by Myanmar security forces against other ethnic minorities in Myanmar. As documented by the [FFM](#), some actions by the Tatmadaw in Kachin and Shan States since 2011, which continue to date, amount to war crimes and crimes against humanity. An accountability initiative for these alleged crimes has not been initiated. To date, a genuine effort to hold accountable members of Ethnic Armed Organizations (EAOs) for actions which may amount to violations of international law, albeit to a lesser extent in comparison to those committed by the Tatmadaw, also does not exist. In any event, all alleged commission of international crimes and violations of international law must be investigated and prosecuted in accordance with international law standards. For now, only time will tell how the current and potential future legal challenges and/or other accountability processes will unfold.

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